

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HENRY H.B. GARNIER, JR.,

Plaintiff,

vs.

HAROLD W. CLARKE, ELLEN E.
NOLAN, CHRISTINE GREGOIRE,
SUSAN R. KOMBEREC and ELDON
VAIL,

Defendants.

NO. CV-07-245-CI

ORDER ADOPTING REPORT AND
RECOMMENDATION AND DISMISSING
ACTION

1915(g)

BEFORE THE COURT is Plaintiff's Objection (Ct. Rec. 27) to the Report and Recommendation to dismiss his Second Amended Complaint. Plaintiff, a former prisoner, is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. After review of Plaintiff's submission and the record as a whole, **IT IS ORDERED** the Report and Recommendation (Ct. Rec. 26) is **ADOPTED in its entirety**.

Plaintiff bases his objections on his "exhibits," which appear to be printouts from the internet referencing U.S. Supreme Court and Ninth Circuit Court of Appeals decisions. Plaintiff cites no actual case law to support his contention the Magistrate Judge's recommendation was in error.

First, Plaintiff's allegation he may sue his public defender,
ORDER ADOPTING REPORT AND RECOMMENDATION AND DISMISSING ACTION -- 1

1 Defendant Ellen E. Nolan, is misplaced; his citation to a headline
2 presumably obtained on the internet (See Plaintiff's Exhibit-II, Ct.
3 Rec. 27), notwithstanding. In the Second Amended Complaint, Mr.
4 Garnier claimed Defendant Nolan did not permit him to pay a \$210.00
5 fine in 1993, advising Plaintiff she would send him a "bill" later.
6 Over time, it appears the amount owing increased to \$2,691.85 (and
7 possibly \$7,205.67)¹.

8 Accepting these claims as true, Plaintiff has presented no facts
9 from which the Court could infer Defendant Nolan acted under color of
10 state law. As a matter of law, a public defender, performing a
11 lawyer's traditional functions, is not a state actor under 28 U.S.C. §
12 1983. See *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *Miranda v.*
13 *Clark County, Nevada*, 319 F.3d 465, 468 (9th Cir. 2003). Therefore,
14 Plaintiff has no basis for a cause of action against Defendant Nolan
15 in this Court.

16 In addition, Plaintiff alleged no facts in his Second Amended
17 Complaint against Defendants Harold W. Clarke, Christine Gregoire,
18 Susan R. Komberec, or Eldon Vail. *Ivey v. Board of Regents*, 673 F.2d
19 266, 268 (9th Cir. 1982). He did not demonstrate how any of these
20 named Defendants caused or personally participated in causing a
21

22 'Based on "page 8" of the exhibits attached to Plaintiff's Second
23 Amended Complaint (Ct. Rec. 18-2), it appears Plaintiff may petition
24 the sentencing court to reduce or waive interest on his legal
25 financial obligations pursuant to RCW 10.82.090 if he meets certain
26 requirements. It does not appear from the complaint Plaintiff has
27 fully pursued this option.

1 deprivation of his protected rights. *Taylor v. List*, 880 F.2d 1040,
2 1045 (9th Cir. 1989). Consequently, Plaintiff failed to state a claim
3 against the named Defendants upon which relief can be granted.

4 Plaintiff objects to the Magistrate Judge's reference to *Wright*
5 *v. Riveland*, 219 F.3d 905, 918 (9th Cir. 2000), and contends his equal
6 protection claim was ignored. He claims House Bill 2010 is a "bill of
7 attainder" which violates "ex fact law," and constitutes "multiple
8 punishments of 5th Amendment." He contends he was required to pay
9 for his cost of incarceration while unemployed inmates were not. He
10 also appears to complain he was not compensated for work he performed
11 within the Department of Corrections between January and February
12 2008.

13 To the extent Plaintiff is arguing he, as an employed inmate, was
14 treated differently than allegedly "lazy" inmates (i.e. unemployed
15 inmates), in that he was required to contribute 35 percent of his
16 wages to defray the costs of his incarceration, while the unemployed
17 inmates were not, he has failed to state an Equal Protection claim.

18 The Equal Protection Clause provides that "No State shall . . .
19 deny to any person within its jurisdiction the equal protection of the
20 laws." The Clause requires that all persons similarly situated be
21 treated alike. *Jackson Water Works v. Public Utils. Comm'n*, 793 F.2d
22 1090, 1092 (9th Cir. 1986). Prisoners are protected under the Equal
23 Protection Clause against invidious discrimination based on race.
24 *Wolff v. McDonnell*, 418 U.S. at 556. The Clause also forbids unequal
25 enforcement of valid laws where such unequal enforcement is the
26 product of improper motive. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
27

1 Inmates, however, do not constitute a suspect protected class.
2 *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th Cir. 1991). In the
3 absence of a fundamental right or a suspect class, an inmate must
4 establish that he was treated differently than other prisoners in his
5 circumstances (i.e. similarly situated inmates). Clearly, those
6 inmates who are employed are not similarly situated to those inmates
7 who are not employed. Plaintiff has failed to present a basis for an
8 Equal Protection claim.

9 Plaintiff argues "House Bill 2010," which authorizes the
10 deduction of 35 percent of an inmate's wages, gifts and gratuities,
11 see RCW 72.09.111(1), violates the Takings Clause of the Fifth
12 Amendment, the prohibition against Bills of Attainder, and *ex post*
13 *facto* laws. Each of these claims was addressed and dismissed in a
14 class action lawsuit in the Western District of Washington.
15 See *Wright v. Riveland*, C95-5381FDB, Report and Recommendation (Ct.
16 Rec. 64), adopted April 9, 1997 (Ct. Rec. 74). Consequently,
17 Plaintiff is precluded from presenting these arguments here.

18 Again, to the extent Plaintiff believes wages were unlawfully
19 withheld from him, Washington State provides Plaintiff an adequate
20 post-deprivation state remedy, see RCW § 4.92 *et seq.* Consequently,
21 any property deprivation claim lacks an arguable basis in law. See
22 *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (unauthorized negligent or
23 intentional deprivation of property does not violate due process if
24 meaningful post-deprivation remedy is available).

25 Therefore, for the reasons set forth above, **IT IS ORDERED** the
26 Report and Recommendation is **ADOPTED in its entirety** and this action

1 is **DISMISSED with prejudice** for failure to state a claim upon which
2 relief may be granted under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

3 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a
4 prisoner who brings three or more civil actions or appeals which are
5 dismissed as frivolous or for failure to state a claim will be
6 precluded from bringing any other civil action or appeal *in forma*
7 *pauperis* "unless the prisoner is under imminent danger of serious
8 physical injury." 28 U.S.C. § 1915(g). Plaintiff is advised to read
9 the new statutory provisions under 28 U.S.C. § 1915. This dismissal
10 of Plaintiff's complaint may count as one of the three dismissals
11 allowed by 28 U.S.C. § 1915(g) and may adversely affect his ability to
12 file future claims.

13 **IT IS SO ORDERED.** The District Court Executive is directed to
14 enter this Order, forward a copy to Plaintiff at his last known
15 address, enter judgment, and close the file. The District Court
16 Executive is further directed to forward a copy of this Order to the
17 Office of the Attorney General of Washington, Criminal Justice
18 Division.

19 **DATED** this 29th day of May 2008.

20 S/ Robert H. Whaley

21 ROBERT H. WHALEY
22 CHIEF UNITED STATES DISTRICT JUDGE
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